BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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APPLICATION TO CHANGE WATER RIGHT NO. 76LJ 30171033 BY LARRY & MELISSA HOEHN	)))	**DRAFT PRELIMINARY DETERMINATION TO GRANT CHANGE**

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On January 16, 2026, Larry and Melissa Hoehn (Applicants) submitted Application to Change Water Right No. 76LJ 30171033 to change Statement of Claim No. 76LJ 30165011 to the Kalispell Regional Office of the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the application on its website. The Department sent Applicants a deficiency letter under § 85-2-302, Montana Code Annotated (MCA), dated February 9, 2026. The Applicants responded with information dated June 9, 2026. A preapplication meeting was held between the Department and the Applicants on May 30, 2025, in which the Applicants designated that the technical analyses for this application would be completed by the Department. The Applicants returned the completed Preapplication Meeting Form on June 4, 2025. The Department delivered the Department-completed Technical Analyses on July 25, 2025. The Department sent the Applicants a letter identifying an error in the Department-completed Technical Analyses on August 6, 2026. The Application was determined to be correct and complete as of July 9, 2026. An Environmental Assessment for this application was completed on September 2, 2026.

INFORMATION

The Department considered the following information submitted by the Applicants, which is contained in the administrative record.

Application as filed:

- Application to Change a Water Right, Form 606
- Attachments:
    - Attachment A
        - Historical photos

- System Diagram
- Pump Curve

- Department- completed Technical Analyses Report based on information provided in the Preapplication Meeting Form, dated July 25, 2025
- Department Completed Errata for Technical Analyses, dated August 6, 2026

Information Received after Application Filed

- An email from the Applicants to the DNRC received June 9, 2026. This email was in response to the Department's February 9, 2026, deficiency letter.

Information within the Department's Possession/Knowledge

- Administrative record file for Statement of Claim No. 76LJ 19042-00
- Administrative record file for Statement of Claim No. 76LJ 30165011

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

For the purposes of this document:

Department or **DNRC** means the Department of Natural Resources and Conservation	
NRCS means the Natural Resource Conservation Service	
USDA United States Department of Agriculture	
ARM means Administrative Rules of Montana	**AOPI** means Area of Potential Impact
FOF means finding(s) of fact	**CFS** means cubic feet per second
GPM means gallons per minute	**POD** means point of diversion
IWR means Irrigation Water Requirements	**AF** means acre-feet
MCA means Montana Code Annotated	**TDH** means total dynamic head
NIR means net irrigation requirement	**IL or ILs** means Irrecoverable losses
HCV means historical consumed volume	

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. The Applicants propose to change Statement of Claim No. 76LJ 30165011. Statement of Claim No. 76LJ 30165011 is for irrigation of 23.10 acres from June 1st to September 30th, annually, at a flow rate of 104.66 GPM up to a total volume of 55.66 acre-feet from Ashley Creek. The place of use for the 23.10 acres is described as 21.90 acres in the SESW Section 20,

Township 28N, Range 21W and 1.20 acres in the NENENW Section 29, Township 28N, Range 21W Flathead County. The point of diversion is located in the SWSESW Section 20, Township 28N, Range 21W and water is conveyed to the place of use by a closed pipe system. Table 1 summarizes the details of Statement of Claim No. 76LJ 30165011.

Table 1: Water Right Proposed for Change

Water Right Number	Priority Date	Purpose	Flow Rate (GPM)	Volume (AF)	Acres	Period of Use	Point of Diversion	Place of Use
76LJ 30165011	9/30/1919	Irrigation	104.66	55.66	23.10	6/1 – 9/30	SWSESW Sec 20 Twp 28N, Rge 21W, Flathead County	SESW Sec 20 Twp 28N, Rge 21W, Flathead County (21.90 acres) NENENW Sec 29 Twp 28N, Rge 21W, Flathead County (1.20 acres)

2. There are no previous change authorizations for 76LJ 30165011. Water right 76LJ 30165011 was split from 76LJ 19042-00 on October 16, 2024. The water right was split proportionally between the buyer and seller based on the place of use described on the abstract. The flow rate and volume were assigned proportionally.

CHANGE PROPOSAL

FINDINGS OF FACT

3. The Applicants propose to move the POD for Statement of Claim 76LJ 30165011 from a point on Ashley Creek in the SWSESW of Section 20, Township 28N, Range 21W, Flathead County upstream 0.25 miles to a point in the NWSESW of Section 20, Township 28N, Range 21W, Flathead County (Figure 1). The proposed POD will be a pump that will serve as the sole POD for 76LJ 30165011 and will supply water to a combination handline and wheel-line sprinkler system for irrigation. The wheel line and handline sprinklers will operate wholly within the historical place of use. The purpose and place of use will remain unchanged. The proposed change will establish a new point of diversion for the Applicants, while the existing POD will be retained for use by the other water rights associated with the historical point of diversion. After

this change the Applicants will appropriate up to 39.63 AF at a flow rate of 104.66 GPM. Table 2 summarizes the proposed use and Figure 1 shows the elements of the proposed change.

Table 2: Summary of Proposed use of 76LJ 30165011								
Water Right Number	**Priority Date**	**Proposed Purpose**	**Proposed Flow Rate (GPM)**	**Proposed Diverted Volume (AF)**	**Proposed Consumed Volume (AF)**	**Proposed Acres**	**Proposed Period of Use**	**Proposed Point of Diversion**
76LJ 30165011	9/30/1919	Irrigation	104.66 (0.23 CFS)	39.63	31.70	23.10	6/1-9/30	**NWSESW*** Sec 20, Twp 28N, Rge 21W, Flathead County

**Bold underlined text indicates the water right element proposed for change.*

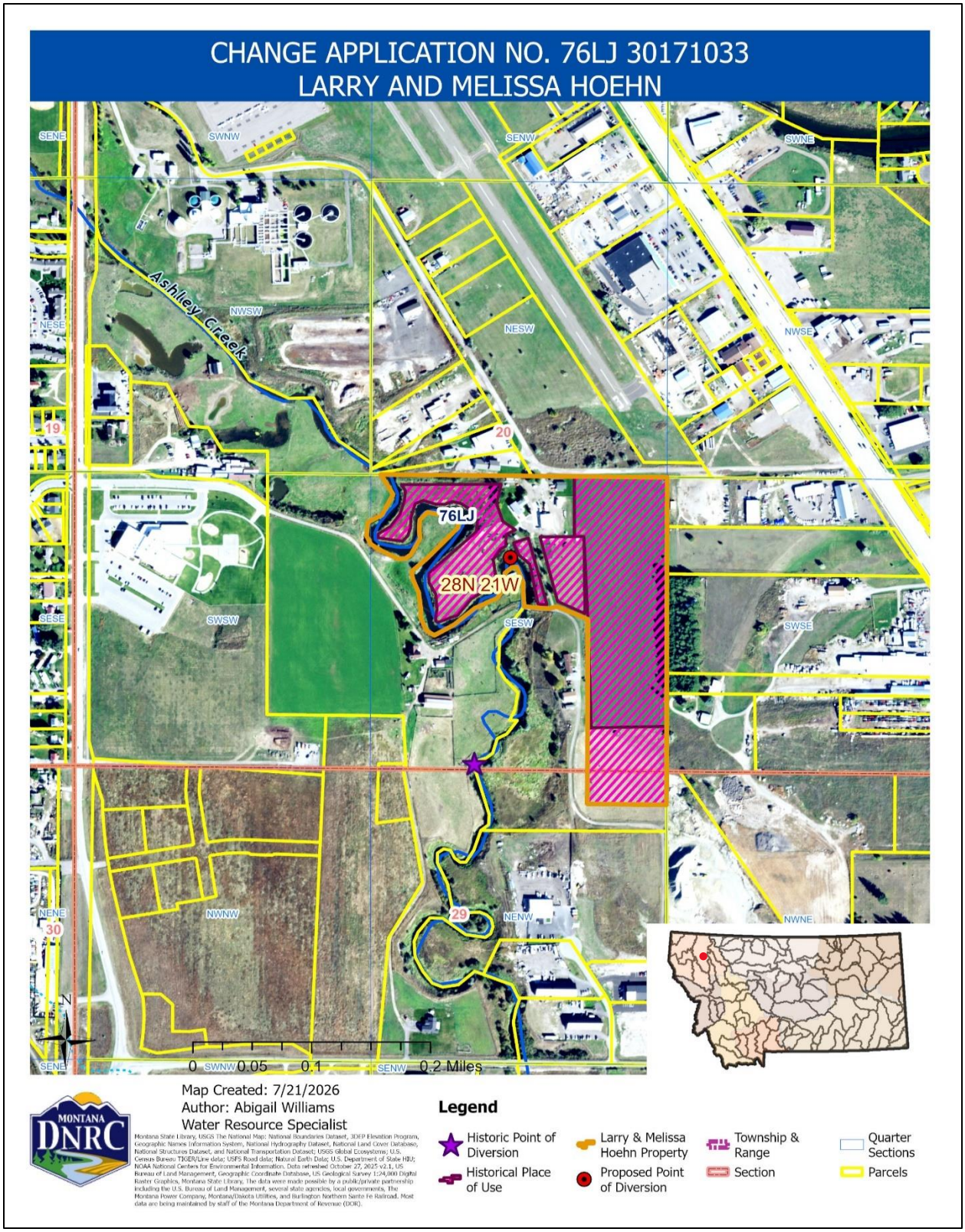


Figure 1. Map of place of use, historical point of diversion, and the proposed point of diversion.

WATER RIGHT CHANGE CRITERIA (§ 85-2-402, MCA)

4. The Department is authorized to approve a change if the Applicants meet its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. *Matter of Royston*, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an Applicant's burden to prove change criteria by a preponderance of evidence is "more probable than not."); *Town of Manhattan v. DNRC*, 2012 MT 81, ¶ 8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

> (2) Except as provided in subsections (4) through (6), and, if applicable, subject to subsections (1)(c) and (15), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:
> (a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.
> (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.
> (c) The proposed use of water is a beneficial use.
> (d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

5. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, ¶¶ 29-31; *Town of Manhattan*, ¶ 8; *In the*

Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company (DNRC Final Order 1991).

HISTORICAL USE FOR ADVERSE EFFECT

FINDINGS OF FACT

6. The historical use of this water right was proven by the Applicants and calculated by the DNRC following the methods described in ARM 36.12.1902 Change Application – Historic Use. The Applicants have firsthand knowledge of the historical use of the water right which was used to irrigate various crops including alfalfa, canola, winter wheat, and potatoes. The land was historically flood irrigated before being converted to a pump and sprinkler system. The Applicants primarily use handline and wheel lines to irrigate the place of use. This Statement of Claim does not involve storage.

Adjudication Status

7. The adjudication of basin 76LJ, including Statement of Claim No. 76LJ 30165011, is currently in process, with the Montana Water Court issuing a preliminary decree for basin 76LJ on February 21, 2025. The Department previously placed three issue remarks on parent water right Statement of Claim No. 76LJ 19042-00 related to the number of irrigated acres indicated by aerial imagery and the validity of the claimed priority date. These issue remarks have been carried over to child water right Statement of Claim No. 76LJ 30165011. The currently enforceable priority date of Statement of Claim No. 76LJ 30165011 is September 30, 1919.

Historical place of use and historically irrigated acres

8. Parent water right Statement of Claim No. 76LJ 19042-00 was examined by the DNRC on August 7, 2012, and 118.90 acres were found to be irrigated. Child water right Statement of Claim No. 76LJ 30165011 was split from parent water right Statement of Claim No. 76LJ 19042-00 on October 16, 2024. The maximum historical acres found for Statement of Claim No. 76LJ 30165011 was 23.10 acres. Table 3 summarizes the historical use of Statement of Claim No. 76LJ 30165011.

Table 3: Summary of historical use of Statement of Claim No. 76LJ 30165011							
Water Right No.	**Historical Purpose**	**Maximum Historical Acres**	**Historical Place of Use**	**Historical Point of Diversion**	**Maximum Historical Flow Rate (GPM)**	**Historically Consumed Volume (AF)**	**Historically Diverted Volume (AF)**
76LJ 30165011	Irrigation	23.10	SESW Sec 20 Twp 28N Rge 21W Flathead (21.90 acres) – NENENW Sec 29 Twp 28N Rge 21W Flathead (1.20 acres)	SWSESW Sec 20 Twp 28N Rge 21W Flathead	104.66 (0.23 CFS)	31.70	39.63

Historical period of diversion

9. The Applicants property is located in USDA NRCS Climatic Area III – Moderate. The standard period of diversion and period of use for USDA NRCS Climatic Area III per ARM 36.12.112 is April 15th to October 15th. The Applicants claimed period of diversion from June 1st to September 30th falls within the standard. As such, the Department finds June 1st to September 30th to be the historical period of diversion.

Historical consumed volume

10. The Department calculated the HCV using the Department's standard methodology, pursuant to ARM 36.12.1902. The consumed volume for irrigation was based on the NIR from USDA NRCS IWR at the Kalispell weather station. The IWR was multiplied by a county-wide management factor (from ARM 36.12.1902) to produce an adjusted IWR representative of actual crop yields in the vicinity of Kalispell, Montana. The Department determined crop consumption by multiplying the adjusted IWR by the number of acres of irrigation. Crop consumption was then divided by the field efficiency (70% for sprinkler irrigation per ARM 36.12.115(2)(e)) to calculate the field applied volume (Table 4, Column G). ILs are 10% of the field applied volume for sprinkler irrigation (Table 4, Column H). The total consumed volume for irrigation is the crop consumption plus ILs (Table 4, Column I) .

11. The HCV and field applied volume for the historical place of use were found using the following equations and information:

$$Crop\ Consumption = Kalispell\ * \frac{1-ft}{12-inches} * Flathead\ County\ Management\ Factor * Historical\ Acres$$

$$Historical\ Irrecoverable\ Losses = Field\ Applied * IL\%$$

$$HCV = \ Crop\ Consumption + Historical\ Irrecoverable\ Losses$$

$$Historical\ Field\ Applied\ Volume = \frac{Crop\ Consumption}{Sprinkler\ Efficency}$$

Crop Consumption

Kalispell Weather Station NIR for 76LJ 30165011: 16.45 in
Flathead County Management Factor (pre-July 1, 1973): 87.6%

$$Crop\ Consumption\ for\ 76LJ\ 30165011 = 16.45\ * \frac{1-ft}{12-inches} * 0.876 * 23.10 = \mathbf{27.74\ AF}$$

Irrecoverable Losses

Irrecoverable losses: 10% for sprinkler irrigation

$$Irrecoverable\ losses\ for\ 76LJ\ 30165011 = 39.63\ AF * 0.10 = \mathbf{3.96\ AF}$$

Historical consumed volume

$$HCV\ for\ 76LJ\ 30165011 = 27.74\ AF + 3.97\ AF = \mathbf{31.70\ AF}$$

Historical field applied

Sprinkler (Wheel line / Handline) Field Efficiency: 70%

$$Field\ Applied\ for\ 76LJ\ 30165011 = \ 27.74\ AF\ /\ 0.70\ = \mathbf{39.63\ AF}$$

Historical diverted volume

12. Per ARM 36.12.1902(10), the historically diverted volume is equal to the sum of the historical field application volume and historical conveyance loss volume. There is no conveyance loss considered as the historical means of diversion for 76LJ 30165011 is closed pipe, therefore, the historical diverted volume is equal to the historical field application volume (Table 5). Table 4 below summarizes the historically field applied and consumed volumes.

Table 4: Historical use.									
A	B	C	D	E	F	G	H	I	J
Irrigation Method	**Acres**	**IWR (in)[1]**	**Mgmt. Factor[2]**	**Field Efficiency**	**Crop Consumption (AF)**	**Field Applied Volume (AF)**	**IL (AF)**	**Total Irrigation Consumed Volume (AF)**	**Non-Consumed Volume (AF)**
Sprinkler (Wheel line & Handline)	23.10	16.45	0.876	0.70	27.74	39.63	3.96	31.70	7.93

[1] Kalispell IWR Weather Station

[2] Flathead County Historical Use Management Factor (1964-1973), from ARM 36.12.1902.

Table 5: Historical Diverted Volume of Statement of Claim No. 76LJ 30165011.			
Water Right No.	**Field Application Volume (AF)**	**Conveyance Loss Volume (AF)**	**Historical Diverted Volume (AF)**
76LJ 30165011	39.63	N/A	39.63

Historical Flow Rate

13. The Applicants are related to the original claimant and have firsthand knowledge of the historical operation of their water right. The Applicants assert that the historical pump was 30-40 horsepower and was selected to maximize efficiency of the historical irrigation system which consisted of a series of five wheel lines and various handline sprinklers. The Applicants recall at least two of the wheel lines running simultaneously but the pipe and sprinkler nozzle specifications are unknown. The historical pump and sprinkler system has since been removed, with the Applicants being the last person with any knowledge of the historical irrigation system.

14. The Department examined the parent water right (Statement of Claim No. 76LJ 19042-00) on August 7, 2012 and noted that the claimed flow rate of 700 GPM resulted in a flow rate of 4.52 GPM per acre. This value is within the Department's examination flow rate guideline which states that irrigation historically required up to 17 GPM per acre depending on the type of diversion and conveyance system. The Applicant's historical system was a pump with closed pipe as the conveyance infrastructure, meaning that there would have been little if any conveyance loss and thus would not require a flow rate approaching the 17 GPM per acre guideline value.

15. The Department finds the following historical use, as shown in Table 6.

Table 6: Summary of historical use findings for 76LJ 30165010

Water Right Number	Historical Purpose	Historical Flow Rate	Historically Consumed Volume *(including IR)*	Historically Diverted Volume	Historically Irrigated Acres	Historical Period of Use & Diversion	Historical Point(s) of Diversion
76LJ 30165011	Irrigation	104.66 GPM	31.70 AF	39.63 AF	23.10	6/1-9/30	SWSESW Sec 20 Twp 28N Rge 21W Flathead

ADVERSE EFFECT

FINDINGS OF FACT

16. The Applicants propose to move the POD for Statement of Claim No. 76LJ 30165011. The proposed POD is located approximately 0.25 miles upstream from the existing POD on Ashley Creek. The existing POD will no longer be used by the Applicants after establishment of the proposed POD. The existing POD will remain in place for use by the other water rights associated with the historical point of diversion. The historical diverted and consumed volumes of 39.63 AF and 31.70 AF, respectively, were found for sprinkler irrigation of the 23.10 acres historical place of use.

17. This change proposes to establish a new POD on Ashley Creek approximately 0.25 miles upstream of the historical/existing POD with no changes in the place of use or purpose. The Department identified an area of potential impact for this application as being the reach of Ashley Creek between the proposed POD and the historical/existing POD. The water rights between the historical/existing POD and the proposed POD were considered for adverse effect. The Department queried all water rights between the proposed POD and the existing POD and found three water rights; (Table 7). All three water rights share the historical/existing POD as their point of diversion.

Table 7: Water rights considered for adverse effect (water rights between the proposed POD and the existing POD)

Water Right Number	Purpose / Means of Diversion	Flow Rate (CFS)
76LJ 19042-00	IRRIGATION	1.15
76LJ 30165010	IRRIGATION	0.10
76LJ 30163969	IRRIGATION	0.13

18. This change will not increase the volume or flow of water diverted or consumed. The Department determined that the timing of and location of return flows will not change because no change in place of use is proposed.

19. The Department finds there is no increased access to water as a result of this change because;

a. The change will not increase the period of diversion, diverted volume, or diverted flow;

b. The Applicants have split their portion of the water right off;

c. There has not been a call on the creek in this area;

d. Ashley Creek conditions are largely unchanged between the historical POD and the proposed POD;

20. Since there will be no change in diverted flow or volume, no change of place of use or purpose, and since the only water rights in the reach that would potentially be adversely affected are all associated with the historical/existing POD, the Department finds no adverse effect to the existing water users within the area of potential impact.

BENEFICIAL USE

FINDINGS OF FACT

21. The Applicants propose to discontinue their use of the historical/existing POD to establish their own new POD for Statement of Claim No. 76LJ 30165011. No change in place of use or purpose is proposed. The Applicants will divert water from Ashley Creek at their new POD for wheel line and hand line irrigation of 23.10 acres wholly within the historical place of use. The historical and diverted irrigated volumes were quantified per ARM 36.12.1902 in the historical use sections above. The proposed irrigation will continue the historical beneficial use within the historical place of use.

22. The Applicants plan to use the full flow rate of 104.66 GPM which was apportioned to them when Statement of Claim No. 76LJ 30165011 was split from the parent water right. Applicants have supplied proof that the selected pump for the new POD is capable of diverting 104.66 GPM (detailed in the Adequacy of Diversion section below). The Applicants will fully

discontinue their use of the historical/existing POD and will solely divert water under Statement of Claim No. 76LJ 30165011 using the proposed new POD. The Applicants have proven the new pump is capable of diverting the apportioned historic volume (detailed in the Adequacy of Diversion section below).

23. The Department finds the proposed change in POD supports the historically proven irrigation purpose which is a beneficial use of water.

ADEQUATE DIVERSION

FINDINGS OF FACT

24. The Applicant proposes to add a new POD to statement of Claim 76LJ 30165011. The new POD is located approximately 0.25 miles upstream of the historical/existing POD. The new POD is located in the NWSESW Section 20, Township 28N, Rage 21W, Flathead County. The new pump will serve a wheel line and handlines wholly within the historical place of use. The Applicants will fully discontinue their use of the historical/existing POD and will solely divert water under Statement of Claim No. 76LJ 30165011 using the proposed new POD.

25. The system is comprised of 54 feet of 5-inch aluminum pipe intake connected to a Cornell 1.5WH-10-3-2 PKG pump. From the outlet of the pump the water is conveyed through 45 feet of 6-inch aluminum pipe before connecting to a buried 6-inch plastic pipe that extends 300 feet laterally underground. The 6-inch plastic pipe connects into 300 feet of aluminum 6-inch pipe once above ground before connecting into 438 feet of 5-inch pipe that runs across the northern portion of the field before connecting the system to the wheel line. The wheel line is comprised of 29 sections of 30-foot 4-inch aluminum wheel line with 9/64-inch nozzles. The wheel line has one wheel line mover that controls the system.

26. The Applicants used Fathom modeling to simulate the system and to calculate the total dynamic head. The Applicants submitted the modeling output that simulated friction loss, elevation head, and output PSI. They calculated a TDH of 190 feet.

27. Applicants provided a pump curve for Cornell pump model 1.5WH-10-3-2 PKG showing that at the calculated TDH the pump is capable of producing 104.66 GPM.

28. The Department finds that the new POD is capable of diverting and conveying the proposed flow rate of 104.66 GPM up to the historically proven annual volume of 39.63 AF.

POSSESSORY INTEREST

FINDINGS OF FACT

29. The Applicants own the property where water is to be put to beneficial use, which demonstrates possessory interest. The Department finds the possessory interest criterion to be met.

CONCLUSIONS OF LAW

HISTORICAL USE AND ADVERSE EFFECT

30. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. *McDonald v. State*, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986) (beneficial use constitutes the basis, measure, and limit of a water right); *Featherman v. Hennessy*, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911) (increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); *Quigley v. McIntosh*, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940) (appropriator may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924) ("quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only"); *Town of Manhattan*, ¶ 10 (an appropriator's right only attaches to the amount of water actually taken

and beneficially applied).[1]

31. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. *Spokane Ranch & Water Co. v. Beatty*, 37 Mont. 342, 96 P. 727, 731 (1908); *Quigley*, 110 Mont. at 505-11,103 P.2d at 1072-74; *Matter of Royston*, 249 Mont. at 429, 816 P.2d at 1057; *Hohenlohe*, ¶¶ 43-45.[2]

32. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the "historic use" of the water right being changed. *Town of Manhattan*, ¶10 (recognizing that the Department's obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change Applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.[3] A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. *Quigley*, 103 P.2d at 1072-75 (it is

[1] DNRC decisions are available at: https://dnrc.mt.gov/Directors-Office/HearingOrders

[2] *See also Holmstrom Land Co., Inc., v. Newlan Creek Water District*,185 Mont. 409, 605 P.2d 1060 (1979); *Lokowich v. Helena*, 46 Mont. 575, 129 P. 1063 (1913); *Thompson v. Harvey*, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley*, 159 Mont. 72, 495 P.2d 186 (1972) (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909) (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, *Gassert v. Noyes*, 18 Mont. 216, 44 P. 959 (1896) (change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff's subsequent right).

[3] A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under § 85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. Section 85-2-234, MCA

necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); *Royston*, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the Applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); *Hohenlohe*, ¶ 44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review,* Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9,1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).[4]

33. An Applicant must also analyze the extent to which a proposed change may alter historic

[4] Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)("[O]nce an appropriator exercises his or her privilege to change a water right … the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right … which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right."); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.,1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)("We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right … he shall file a petition requesting permission to make such a change …. The change … may be allowed provided that the quantity of water transferred … shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. *E.g., Hohenlohe*, ¶ 44; *Rock Creek Ditch & Flume Co. v. Miller*, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930); *Popham v. Holloron*, 84 Mont. 442, 275 P. 1099, 1102 (1929); *Galiger v. McNulty*, 80 Mont. 339, 260 P. 401 (1927); *Head v. Hale*, 38 Mont. 302, 100 P. 222 (1909); *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731; *Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; ARM 36.12.101(56) (Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).[5]

34. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. *Royston*, 249 Mont. at 431, 816 P.2d at 1059-60; *Hohenlohe*, at ¶¶ 45-46 and 55-6; *Spokane Ranch & Water Co.*, 37 Mont. at 351-52, 96 P. at 731.

35. In *Royston*, the Montana Supreme Court confirmed that an Applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a change proceeding in the following manner:

> The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates

[5] The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. *Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, 198 P.3d 219,(*citing Hidden Hollow Ranch v. Fields*, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

> return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the "amount historically consumed" and the water that re-enters the stream as return flow. . . .
>
> An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator "is entitled to have the water flow in the same manner as when he located," and the appropriator may insist that prior appropriators do not affect adversely his rights.
>
> This fundamental rule of Montana water law has dictated the Department's determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.
>
> We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

36. The Department's rules reflect the above fundamental principles of Montana water law and are designed to itemize the type of evidence and analysis required for an Applicant to meet its burden of proof. ARM 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. ARM 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. ARM 36.12.1901 and 1903.

37. Applicant seeks to change existing water rights represented by its Water Right Claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right"

requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In *McDonald v. State*, the Montana Supreme Court explained:

> The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; *see also Matter of Clark Fork River Drainage Area*, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

38. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. *In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties*, 295 Mont. 447, 453, 984 P.2d 151, 155 (1999) (Water Resources Survey used as evidence in adjudicating of water rights); *Wareing v. Schreckendgust*, 280 Mont. 196, 213, 930 P.2d 37, 47 (1996) (Water Resources Survey used as evidence in a prescriptive ditch easement case); *Olsen v. McQueary*, 212 Mont. 173, 180, 687 P.2d 712, 716 (1984) (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

39. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. *E.g., In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, DNRC Proposal for Decision adopted by Final Order (2005). The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. *See MacDonald*, 220 Mont. at 529, 722 P.2d at 604; *Featherman*, 43 Mont. at 316-17, 115 P. at 986; *Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources*, 91 P.3d 1058, 1063 (Colo., 2004).

40. The Department has adopted a rule providing for the calculation of historic consumptive use where the Applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902(16). In the alternative an Applicant may present its own evidence of historic beneficial use. In this case Applicants have elected to proceed under ARM 36.12.1902. (FOF No. 6).

41. If an Applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902(16), the Applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. *E.g., Application for Water Rights in Rio Grande County*, 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*; *Orr v. Arapahoe Water and Sanitation Dist*., 753 P.2d 1217, 1223-1224 (Colo., 1988) (historical use of a water right could very well be less than the duty of water); *Weibert v. Rothe Bros., Inc.,* 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo. 1980) (historical use could be less than the optimum utilization "duty of water").

42. Based upon the Applicant's evidence of historic use, the Applicants has proven by a preponderance of the evidence the historic use of 76LJ 30165011 including a diverted volume of 39.63 AF, a historically consumed volume of 31.70 AF, and flow rate of 104.66 GPM. (FOF Nos. 6-15)

43. Based upon the Applicant's comparative analysis of historic water use and return flows to water use and return flows under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. Section 85-2-402(2)(a), MCA. (FOF Nos. 16-20)

<u>BENEFICIAL USE</u>

44. A change Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. Sections 85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use

within the appropriation will be the basis, measure, and the limit of all water rights in Montana . . ." McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. ARM 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. *E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review*, Cause No. BDV-2002-519 (Mont. 1st Jud. Dist. Ct.) (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); *Worden v. Alexander*, 108 Mont. 208, 90 P.2d 160 (1939); *Allen v. Petrick*, 69 Mont. 373, 222 P. 451(1924); *Sitz Ranch v. DNRC*, DV-10-13390,, *Order Affirming DNRC Decision*, Pg. 3 (Mont. 5th Jud. Dist. Ct.) (2011) (citing *BRPA v. Siebel*, 2005 MT 60, and rejecting Applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396 (1900) ("The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes."); § 85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

45. Applicants propose to use water for irrigation which is a recognized beneficial use. Section 85-2-102(5), MCA. Applicants have proven by a preponderance of the evidence irrigation is a beneficial use and that 39.63 AF of diverted volume and 104.66 GPM of water requested is the amount needed to sustain the beneficial use and is within the standards set by DNRC Rule/other standard. Section 85-2-402(2)(c), MCA (FOF Nos. 21-23).

ADEQUATE MEANS OF DIVERSION

46. Pursuant to § 85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. *Crowley v. 6th Judicial District Court*, 108 Mont. 89, 88 P.2d 23 (1939*); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of*

Wyoming LLC (DNRC Final Order 2002) (information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

47. Pursuant to § 85-2-402 (2)(b), MCA, Applicants have proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 24-28)

POSSESSORY INTEREST

48. Pursuant to § 85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

49. The Applicants have proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 29).

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that this Application to Change Water Right No. 76LJ 30171033 should be GRANTED subject to the following.

The Department determines the Applicants may divert water from the Ashley Creek, by means of a pump, from June 1st to September 30th at 104.66 GPM up to 39.63 AF per year, from a point in the NWSESW Section 20, Township 28N, Range 21W, for irrigation of 23.10 acres from June 1st to September 30th. The place of use is located in the SESW Section 20 Township 28N, Range 21W and the NENENW Section 29, Township 28N, Range 21W.

NOTICE

The Department will provide a notice of opportunity for public comment on this Application and the Department's Draft Preliminary Determination to Grant pursuant to § 85-2-307, MCA. The Department will set a deadline for public comments to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives public comment, the Department shall consider the public comments, respond to the public comments, and issue a preliminary determination to grant the application, grant the application in modified form, or deny the application. If no public comments are received pursuant to § 85-2-307(4), MCA, the Department's preliminary determination will be adopted as the final determination.

DATED this 3rd day of September, 2026.

James Ferch, Manager
Kalispell Regional Water Resources Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the DRAFT PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 3rd day of September, 2026, by first class United States mail.

LARRY AND MELISSA HOEHN

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